1985 April 10

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

DEMETRIOU DAIRY PRODUCTS LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF FINANCE,
2. THE DIRECTOR OF CUSTOMS AND EXCISE,

Respondents.

(Case No. 374/70).

Legitimate interest—Article 146.2 of the Constitution—Free, voluntary and with no reservation acceptance of an administrative act deprives the acceptor of his legitimate interest to pursue a recourse against the act—Classification of goods for purposes of customs duty—Applicants having accepted in advance the sub judice classification, lost their legitimate interest to pursue a recourse against it—Section 161(1) of the Customs and Excise Law, 1967, (Law 82/1967).

Administrative Law—Customs duty—Classification of goods for purposes of—Judicial control—Principles applicable.

Customs duty—Classification of goods—Judicial control—Principles applicable—Vans having only part of their body insulated as refrigerators—Reasonably open to the respondent to classify them under sub-heading 99 and not 91 of tariff heading 87.02.

During October and November, 1970 the applicants imported four vans for use in their business for the sale of ice-cream; and they cleared them, through their clearing agent, who, when filling the prescribed forms after consulting the customs officer and also using for guidance certain instructions issued by the Director of the Depart-

ment of Customs and Excise classified the vans under tariff heading 87.02, sub-heading 99. This classification was accepted as correct by the Department of Customs and Excise and the applicants paid the prescribed amount of customs duty which amounted to £735.490 mils and cleared the vehicles. Some days later the applicants objected orally to the above classification and requested the inspection of one of the aforesaid vans claiming that the vans should have been classified under sub-heading 91, which attracts no import duty. The van was inspected and found to have been correctly classified under sub-heading 99. Hence the present recourse which was based on the ground that the respondents imposed customs duty on the four vans of the applicants contrary to the provisions of sub-heading 91* of tariff heading 87.02 which provides that vans fitted with bodies specially designed for the transportation of food-staffs in a frozen condition are imported free of duty.

Counsel for the respondents raised the preliminary objection that the applicants have no legitimate interest to pursue this recourse, because they have caused and/or accepted in advance the imposition of the duty and/or the decision complained of.

Held, (I) *on the preliminary objection:*

That acceptance of an administrative act deprives the applicant of his legitimate interest to pursue his recourse; that, further, such acceptance must be free and voluntary and with no reservation; that the applicants have, by accepting in advance the sub judice classification even though they might have been in a hurry to clear their vans, lost their legitimate interest to pursue this recourse (see section 161(1) of the Customs and Excise Law, 1967 (Law 82/1967).

Held, (II) *on the merits of the recourse:*

That in matters of classification of goods such as the present case, an administrative Court has no competence

* Sub-heading 91 provides as follows:
«Lorries and van-type vehicles fitted with a body specially designed for the transportation of food-staffs in a frozen condition».

to substitute its own discretion in the place of the discretion of the appropriate authorities; that, of course, as in every other case of recourse under Article 146 the Court has to examine the legality of the sub judice decision, and also whether it was reached through any misconception and cognate matters; that taking into consideration that there has been no allegation either of lack of due inquiry or misconception of fact; that having regard to the undisputed fact that the vans in question have not their whole body insulated as refrigerators but only a part of it and to the wording of sub-heading 91, it was reasonably open to the Director of Customs and Excise to make a distinction between these vans and other vehicles whose whole bodies are insulated as refrigerators producing their own refrigeration, and classify them under sub-heading 99 as he did; and that, therefore, it is not open to this Court, in the absence of any valid ground, to interfere with such decision; accordingly the recourse must fail.

Recourse dismissed.

Cases referred to:

Tomboli v. *CY.T.A.* (1980) 3 C.L.R. 267 at pp. 277-279;

HadjiConstantinou v. *Republic* (1984) 3 C.L.R. 319;

Tymvios v. *Republic* (1968) 3 C.L.R. 631;

Antoniades v. *Republic* (1965) 3 C.L.R. 673 at p. 680;

Makrides v. *Republic* (1979) 3 C.L.R. 584 at p. 601.

Recourse.

Recourse against the decision of the respondents to classify four motor-vans imported by applicants under tariff heading 87.02 sub-heading 99 of the second schedule to Law No. 81 of 1967 and to require the payment of customs duty.

L. Demetriades, for the applicants.

Cl. Antoniades, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

L. Loizou J. read the following judgment. The applicants, a company of limited liability, pray for a declaration that:

(a) The decision of the respondents to demand from applicants the payment of £854.550 mils or any other sum, or at all, as customs duty in respect of four motor-vans imported by them is null and void and of no effect whatsoever; and

(b) The decision of the respondents not to classify the aforesaid vans under tariff heading 87.02, sub-heading 91, of Chapter 87 of the Second Schedule to Law 81 of 1967 and/or their decision to classify the said vans under a sub-heading requiring payment of customs duty is null and void and of no effect whatsoever.

The facts of the case are briefly as follows:

The applicants are manufacturers and dealers of, inter alia, ice-cream.

On or about the 1st October, 1970, the applicants imported two "Bedford" vans and on or about the 3rd November, 1970, two "Viva" vans, for use in their business for the sale of ice-cream. The applicants cleared their aforesaid vans, through their clearing agent, who, when filling the prescribed forms (exhibits 2, 2(a) and 2(b) after consulting the customs officer and also using for guidance certain instructions issued by the Director of the Department of Customs and Excise entitled "Tariff Information Sheet No. 14" (exhibit 4) which was based on decisions taken by him regarding the classification of certain specified goods, classified the aforesaid vans under tariff heading 87.02, sub-heading 99. This classification was accepted as correct by the Department of Customs and Excise and the applicants paid the prescribed amount of customs duty which, as agreed by the parties, amounted to £735.490 mils (and not to £854.550 mils as stated in the prayer) and cleared the vehicles.

Some days later, either in November or December, 1970, the applicants, as it transpires from the evidence adduced on both sides, objected orally through one of their Directors, Mr. Demetriou, to the above classification and requested

the inspection of one of the aforesaid vans claiming that the vans should have been classified under sub-heading 91 which attracts no import duty. The van was inspected and found to have been correctly classified under sub-heading 99. There has been no written application or decision in this respect.

The applicants then filed the present recourse which is based on the ground that the respondents imposed customs duty on the four vans of the applicants contrary to the provisions of sub-heading 91 of tariff heading 87.02 which provides that vans fitted with bodies specially designed for the transportation of food-staffs in a frozen condition are imported free of duty.

Counsel for the respondents raised, by his Opposition, the preliminary objection, that the applicants have no legitimate interest to pursue this recourse, because they have caused and/or accepted in advance the imposition of the duty and/or the decision complained of. The application was also opposed on the ground that, without prejudice to the preliminary objection, in any event, the sub judice decision was properly taken after all relevant facts and circumstances were taken into consideration.

I propose to deal with the preliminary objection first.

In support of this objection counsel for the respondents argued that the applicants never contested the classification of the vans in question at any time before or during clearance but only some time after their clearance when one of the vans was taken for inspection and re-classification. In this way, in counsel's contention, the applicants, having consented to and accepted in advance the administrative act concerned, lost their legitimate interest to challenge it by a recourse.

Counsel for applicants, on the other hand, argued that the acceptance of the classification by the applicants was not a voluntary act because they had to fill in the forms in the way they did so that they might clear their vans without delay and that, in fact, they had no alternative.

One of the Directors of the applicant company, Mr. Demetriou, and the clearing agent who actually cleared the

vehicles from customs gave evidence for the applicants whereas counsel for the respondents called a customs officer as a witness.

It is a principle of administrative Law that acceptance of an administrative act deprived the applicant of his legitimate interest to pursue his recourse and further that such acceptance must be free and voluntary and with no reservation. (See, Conclusions from the Case Law of the Greek Council of State 1929-59, p. 260 and the cases of *Tomboli* v. *CY.T.A.* (1980) 3 C.L.R. 267, at pp. 277-279; and *HadjiConstantinou* v. *The Republic* (1984) 3 C.L.R. 319).

It is an uncontested fact that the applicants did pay the customs duty before clearing the goods. Although this is prima facie, evidence of acceptance of the classification it is, in my view, necessary to consider the surrounding circumstances of the case. Before doing so it is pertinent to refer to the relevant provisions of the Laws in force.

Before 1967 the Customs Management Law, Cap. 315, was applicable, in accordance with section 159 of which, when there was a dispute as to the amount or rate of customs duty payable or as to the liability of any goods to customs duty the owner of the goods could pay the amount demanded under protest and then bring an action (within three months) against the Government for the recovery of the whole or any part of the sum so paid. This Law was repealed by the Customs and Excise Law, 1967 (Law 82 of 1967). The relevant section under this Law is section 161(1) which reads as follows:

«161(1) Έάν, πρίν ή εισαχθέντα έμπορεύματα παραδοθῶσιν έκ τοῦ τελωνειακοῦ ελέγχου, άναφυῆ οίαδήποτε διαφορά καθ' ὅσον άφορᾶ εἰς τό ἐάν ὀφείλεται ἐπ' αὐτῶν οἱοσδήποτε δασμός ή τό ποσόν τούτου, ὁ εἰσαγωγεύς ὀφείλει νά καταβάλη τό αἰτούμενον ὑπό τοῦ ἀρμοδίου λειτουργοῦ ποσόν, δύναται ὅμως ἐντός τριῶν μηνῶν τό βραδύτερον ἀπό τῆς πληρωμῆς—

(α) ἐάν μέν ή διαφορά ἀφορᾶ εἰς τήν ἀξίαν τῶν ἐμπορευμάτων .....

(β) ἐν πάσῃ ἑτέρᾳ περιπτώσει νά ὑποβάλῃ αἴτησιν τῷ ἀρμοδίῳ δικαστηρίῳ δι' ἀπόφασιν αὐτοῦ περί τό

ποσὸν τοῦ τυχὸν κατὰ νόμον πληρωτέου ἐπὶ τῶν ἐμπορευμάτων δασμοῦ.»

"161(1). If, before the delivery of any imported goods from customs control, any dispute arises at to whether any import duty is payable in respect of them or as to the amount of such duty, the importer has to pay the amount demanded by the competent officer, but may, not later than three months after payment—

(a) If the dispute is in relation to the value of the goods

. . . . . .

(b) In any other case, apply to the competent Court for a decision as to the amount, if any, payable under the Law as import duty on the goods.)"

So, at the relevant time Law 82/67 was in force under which there was no provision for payment under protest, but the applicants could, if there was a dispute with regard to the classification of the goods and the payment of duty, pay the duty demanded and then apply to the Court for the recovery of same. In applying the Law to the facts of the case, however, one must not loose sight of the general principles of administrative Law, and particularly the principle of acceptance or acquiescence to the particular act or decision complained of.

Under the Customs Management Law, Cap. 315 (s. 159 (3)), there was provision that no action would lie for the recovery of any sum paid by way of customs duty, unless before payment was made the words "paid under protest" were written on every copy of the entry of the goods and signed by the owner of the goods or his agent. This provision which would provide evidence or non-acceptance of the decision was not included in Law 82/67 and I must rely on the oral evidence adduced in these proceedings.

Another relevant aspect is, that under the provisions of s. 161(1) of Law 82/67, cited above, the dispute must arise before the goods are delivered from customs control for the importer to be able to avail himself of its provisions.

Having carefully perused the evidence adduced I find that although the applicants informed their clearing agent that they did not pay any duty on previous occasions, did, in fact, enter, through him, on the relevant forms the classification suggested by the customs authorities and did pay the duty payable thereunder without any protest. It was only several days after payment was effected and the goods were delivered that one of the Directors of the applicants visited the customs office in Nicosia and complained about the classification of the four vans and, upon his request one of the vans was inspected.

In the circumstances I must hold that the applicants have, by accepting in advance the sub judice classification, even though they might have been in a hurry to clear their vans, lost their legitimate interest to pursue this recourse.

But, irrespective of this, I will proceed and examine the recourse on its merits on the assumption that the applicants have a legitimate interest to pursue it.

Tariff heading 87.02, sub-heading 91, Chapter 87 of the Second Schedule to Law 81/67 which is the tariff head under which the applicants claimed that their vans should have been classified reads, in its relevant part, as follows:

«Φορτηγὰ αὐτοκίνητα καὶ ὀχήματα τύπου 'βὰν' ἐφωδιασμένα μὲ ἀμάξωμα εἰδικῶς σχεδιασθὲν διὰ τὴν μεταφορὰν τροφίμων ἐν ψύξει.»

("Lorries and van-type vehicles fitted with a body specially designed for the transportation of food-staffs in a frozen condition").

Sub-heading 99 which is the one under which the vans were classified reads "λοιπά" (others).

It is the case for the applicants that the Law being in fact a taxation Law should be interpreted in a way more favourable to the applicants and in this sense the word "ἀμάξωμα" (body) in sub-heading 91 should be interpreted in a wide sense so as not to mean that the whole body should be insulated as a refrigerator but that it is sufficient if only a part of it is so insulated.

Counsel for the respondents, on the other hand, argued

that sub-heading 91, as it is drafted, presents no ambiguity and the words should, therefore, be interpreted literally, in which case the word "άμάξωμα" (body) means the whole body of the vehicle. The sole question for decision is whether the vans in question have been correctly classified under tariff head 87.02, sub-heading 99 or whether they should have been classified under sub-heading 91.

Questions of classification of goods have been treated by this Court as falling within the discretion of the administration and that the Court cannot substitute its own discretion for that of the administration, but can only test the legality of such decision. See, in this respect, the cases of *Tymvios* v. *The Republic* (1968) 3 C.L.R. 631; and *Antoniades & Co.* v. *The Republic* (1965) 3 C.L.R. 673 at p. 680 where it is stated—

> "In matters of classifacation of goods such as the present case, an administrative Court has no competence to substitute its own discretion in the place of the discretion of the appropriate authorities. (Vide decisions of the Council of State in Greece 479/1938, 564/1949); but, of course, as in every other case of recourse under Article 146 the Court has to examine the legality of the sub judice decision, and also whether it was reached through any misconception and cognate matters."

The above was quoted and followed in the case of *Makrides and The Republic* (1979) 3 C.L.R. 584 at p. 601.

The only matter that remains to be considered is whether the discretion of the Director of Customs and Excise was properly exercised.

There has been no allegation either of lack of due inquiry or misconception of fact or anything else rendering the sub judice decision invalid for wrong exercise of discretion and the whole question turns on the construction of the relevant sub-heading.

It is an undisputed fact the the vans in question have not their whole body insulated as refrigerators but only a part of it. In fact there is a refrigerating chamber fitted in the body of the vehicle where ice-cream is kept in a frozen state. This refrigerating chamber does not supply refrige-

ration but electricity is switched to it from outside the vans during the night time when the vans are not in use so that the refrigerating chamber gets cool and it keeps cool during the next day. Also, the body of the vans has windows for the retail sale of ice-cream and space is left around the refrigerating chamber for the salesman to move about. In fact these same vans are also used for the retail sale of ice-cream.

In the circumstances and having regard to the wording of sub-heading 91, it was, in my view, reasonably open to the Director of Customs and Excise to make a distinction between these vans and other vehicles whose whole bodies are insulated as refrigerators producing their own refrigeration, and classify them under sub-heading 99 as he did. And this being the position it is not open to this Court, in the absence of any valid ground, to interfere with such decision.

In the result this recourse fails and its is dismissed.

Recourse dismissed.
No order as to costs.